INDEX.

Subject Index.

	Page
Opinion and judgment below	1
Statement of the case	2
Specifications of error	2
Statute involved	3
Reply to specification of error No. 1	3
Concurrence of the circuit court of appeals with the district court	3
The pleadings	3
Theory on which case was tried	3
Grounds of motion for directed verdict	4
Action of court on motion for directed verdict	4
Statement of circuit court of appeals as to issues involved	4
Decision of circuit court of appeals on these issues	5
Authorities cited by circuit court of appeals in support of its decision	6
Proposition of fact on concurrence of district court and circuit court of appeals	6
Propositions of law applicable thereto	7
Reply to specification of error No. 2	7
Proximate cause, a question of law in this case	8
The evidence upon which directed verdict was given	8
Undisputed facts	8
Disputed facts	11
Speed	11
Warning signals	11
Vision	12
Conclusion	13

Cases Cited.

(a)

Atlantic Coast Line R. R. Co. v. Gornto, 89 Fla. 97	6
Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 62 Law Ed. 1096	8

(b)

Michael U. Boemer v. Pennsylvania Railroad Co., 252 U. S. 496, 64 Law Ed. 680	7

(c)

Covington v. Seaboard Air Line Ry., 99 Fla. 1102	6
Chicago Junction Ry. Co. v. William R. King, 222 U. S. 222, 56 Law	

Page

Ed. 173 7
Chicago & North Western Ry. Co. v. Andrews, 130 Fed. 65, 70 11
Chicago, Rock Island & Pacific R. R. Co. v. Houston, 95 U. S. 697, 24 Law Ed. 542 13

(n)

Northern Pacific Railroad Co. v. Freeman, 174 U. S. 379, 43 Law Ed. 1014 11
New York Central R. R. Co. v. Antonia Ambrose, as Admx., etc., 280 U. S. 486, 74 Law Ed. 562 14

(p)

Pennsylvania Railroad Co. v. Margaret V. Chamberlain (decided by this Court February 13, 1933), 77 Law Ed. 503 (see pages 506-507) 14

(s)

Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 507, 68 Law Ed. 413 8
Seaboard Air Line Ry. Co. v. Tomberlin, 70 Fla. 435 6
Southern Ry. Co. v. Mann, — Fla. —, 108 Sou. 889 6

(t)

Texas & New Orleans R. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548, 74 Law Ed. 1034 7
Telfer v. Northern R. R. Co., 30 New Jersey Law Reports, page 188, see page 196 13

(w)

Waters-Pierce Oil Co. v. Van Elderen et al., 137 Fed. 557 8
Webster Electric Co. v. Splitdorf Electric Co., 264 U. S. 463, 68 Law Ed. 792 8

TEXTBOOKS CITED.

Moore on Facts, Vol. 1, Par. 281, page 296 13
Par. 192 14

TEXTBOOK CITED.

Compiled General Laws, 1927, Sec. 7052 6

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 71

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF RESPONDENT.

I.

With the statement of petitioner in her brief captioned "OPINION AND JUDGMENT BELOW" we quite agree.

II.

With the statement in her brief captioned "JURISDICTION" we, likewise, agree.

III.

With the "STATEMENT OF THE CASE", so captioned in petitioner's brief, we most respectfully disagree, and state that the record does not show the facts to be as therein set forth. However, before setting forth our views as to these facts we think a correct statement of the issues and of the findings of the court below will save much time and useless discussion.

IV.

Under the caption "SPECIFICATION OF ERRORS" No. 1 it is said that the court of appeals erred in holding that petitioner could not recover, notwithstanding the fact that the evidence did not establish as a matter of law that the husband's negligence was the sole proximate cause of the injury; and

No. 2, in holding that petitioner was not entitled to have the question of her right of recovery submitted to the jury.

In answer to Specification No. 1, we respectfully submit that the circuit court of appeals did not so hold, and should not have so held, but, on the contrary, concurred with the district court in holding that the sole proximate cause of this accident, resulting in the death of plaintiff's husband, was his own negligence, and that respondent was without fault.

In answer to Specification No. 2, we say that if it is sought thereby to have this Court review the facts found by the district judge and concurred in by the circuit court of appeals, that this writ of error should be dismissed, because the petition for certiorari was not sought on this ground nor granted upon this ground. Secondly, that a review of the facts as they actually existed, and as shown by the record, will conclusively show that no question for the jury was presented.

V.

Under the caption "STATUTES INVOLVED", the Florida Statutes are correctly quoted, but neither their construction nor application are in any way involved herein.

ARGUMENT.

Reply to Specification of Error No. 1.

Concurrence of the Circuit Court of Appeals with the District Court.

The district court directed a verdict upon the ground that there was no negligence of the defendant which proximately contributed to the accident (R., p. 90). This is, likewise, conceded by petitioner's brief in her application for certiorari. (See page 5 of printed brief.)

Inasmuch as it seems to be argued with a great deal of enthusiasm, and at length, that the circuit court of appeals held that the negligence of the defendant was a concurring, proximate cause, we may well examine the pleadings, the contentions of plaintiff and defendant, and the opinion of the circuit court of appeals on those pleadings and contentions, and the authorities cited by that court to sustain its ruling.

(A) THE PLEADINGS.

The declaration in this cause alleged negligence generally and specific acts of negligence in five counts (R., ppgs. 25 to 35). The plea of the defendant was—Not Guilty (R., p. 35). There was no plea of contributory negligence in any aspect.

(B) THEORY ON WHICH CASE WAS TRIED.

On the trial of the case the defendant, through its attorney, was attempting to elicit the facts with respect to the

happening of the accident in order to sustain its plea, and asked the following question:

> "Q. Please state in your own way where you were, what you were doing, what you heard and what you saw?" (R., p. 70.)

Thereupon attorney for plaintiff objected upon the ground that the question tended to elicit from the witness evidence tending to show contributory negligence when the defense had not been pleaded.

The lower court in overruling this objection stated that in a plea of general issue the defendant may show that the plaintiff's negligence was the proximate cause of the injury; that there was no question of comparison because it was not raised in the pleadings.

(C) Grounds of Motion for Directed Verdict.

At the conclusion of all of the evidence in the case, the defendant moved for a directed verdict upon the ground that there was no evidence of any negligent act of the defendant which was the proximate cause of the injury. Secondly, that the proximate cause of the injury was the negligence of the driver (R., p. 88).

(D) Action of Court on Motion for Directed Verdict.

The ruling of the district court thereon was, as is conceded in petitioner's brief, that there was no evidence of any negligence of the respondent that in any way contributed to the accident (R., p. 90).

(E) Statement of Circuit Court of Appeals as to Issues Involved.

The circuit court of appeals in its opinion, after stating generally the nature of the actions, the negligence alleged,

the plea of the defendant, the action of the trial court in directing a verdict, stated:

> "Appellant contends in support of her assignments that it was error to take the case away from the jury" (R., p. 93).

The opinion then purports to state the facts as disclosed by the record, which purported statement we most respectfully and deferentially submit does an injustice to the defendant in material particulars, as shown by the record. (The assumption of the correctness of said statement probably accounts for the dissenting opinion of Circuit Judge Hutcheson.)

The circuit court of appeals thereupon states the contention of the appellee, as follows:

> "It is appellee's contention that the presumption of its negligence, which arose under that action, upon proof of the injuries as alleged, was overcome by further proof which disclosed that those injuries were caused solely by the negligence of the injured persons, and that the case presented is not one which calls for the application of the rule prescribed in Section 7052 for apportionment of damages, because no fault was attributable to it" (R., p. 95).

(F) Decision of Circuit Court of Appeals on These Issues.

The circuit court of appeals thereupon made its ruling upon these contentions, as follows:

> "A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching train. Notwithstanding Section 7052 he could not have recovered for an injury, and so recovery cannot be had on account of his death" (R., p. 96).

(G) Authorities Cited by Circuit Court of Appeals in Support of Its Decision.

As authority supporting these contentions, the circuit court of appeals cited:

"*S. A. L. Ry. v. Tomberlin*, 70 Fla. 435.
Egley v. *S. A. L. Ry.*, 84 Fla. 147.
A. C. L. Ry. Co. v. *Gornto*, 89 Fla. 97.
F. E. C. Ry. v. *Davis*, 96 Fla. 171.
Covington v. *S. A. L. Ry.*, 99 Fla. 1102.
Southern Ry. Co. v. *Mann*, — Fla. —, 108 Sou. 289" (R., p. 96).

Propositions of Fact on Concurrence of District Court and Circuit Court of Appeals.

The circuit court of appeals concurred in its finding of facts as disclosed by the record, that the defendant was not guilty of any negligence, the proximate cause of this accident, because:

(*a*) The pleadings raised only the question of proximate cause, not contributory negligence, either simple or gross.

(*b*) The circuit court of appeals in its opinion, by setting forth the contention of the plaintiff and then that of the defendant, thus made the issue to be decided, to-wit: Was any fault to be attributed to the defendant or was the accident an injury caused solely by the negligence of the injured persons?

(*c*) Its ruling that no recovery could be had, notwithstanding Section 7052, demonstrates that it found the defendant was guilty of no negligence, the proximate cause of the accident, and that the accident was caused solely by the negligence of the driver, petitioner's husband.

(*d*) The cases cited in support of this ruling are all cases dealing with the question of sole proximate cause and the

rulings thereon being based upon such contentions, and in which cases the rule with respect to the concurring negligence of the defendant was fully set forth and explained, thus demonstrating that the court had in mind the Comparative Negligence Statute and the effect thereof, when the defendant was guilty of concurring negligence.

Propositions of Law Applicable Thereto.

The facts found by the District Court were that there was no negligence on the part of the railroad that in any way contributed to the accident. The Circuit Court of Appeals concurred in this finding. Therefore, this Court will accept the concurrent judgment of the lower courts that the respondent was not guilty of negligence proximately contributing to the injury.

Chicago Junction Ry. Co. v. *William R. King*, 222 U. S. 222; 56 Law Ed. 173.

Michael U. Boemer, v. *Pennsylvania Railroad Co.*, 252 U. S. 496; 64 Law Ed. 680.

Texas & New Orleans Railroad Co. v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548; 74 Law Ed. 1034.

Reply to Specification of Error No. 2.

If we are correct in the position we have taken, that there is a concurrent finding of facts of the two lower courts, the petitioner is not entitled to a review of this Court of those facts to determine whether or not the lower courts were in error in so finding, because the petitioner for writ of error was not sought upon this ground but only upon the ground that while the district court held there could be no recovery because the defendant was without fault, the circuit court of appeals held that there could be no recovery notwithstanding the defendant was guilty of concurring negligence.

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 507; 68 Law Ed. 413.

Alice State Bank v. *Huston Pasture Co.*, 247 U. S. 240; 62 Law Ed. 1096.

Webster Electric Co. v. *Splitdorf Electric Co.*, 264 U. S. 463; 68 Law Ed. 792.

Proximate Cause a Question of Law in This Case.

Should we be in error as to our position with respect to the concurrent finding of the two lower courts and the applicable law pertinent thereto, we say that a careful analysis of this evidence discloses that the directing of a verdict in this case was entirely proper.

We, of course, recognize the rule of law that where the proximate cause of an injury depends upon a state of facts from which different minds might draw different inferences, it is a proper question for the jury. The converse of this is equally true, where it is clear and undisputed beyond any persuasive evidence to the contrary that defendant's negligence was not the proximate cause or a proximate cause and that plaintiff's negligence was the sole proximate cause, the court should decide the question without leaving the jury to pass upon an issue of fact, or where under the testimony the cause of an accident resulting in a personal injury is conjectural merely, the case should not go to the jury.

See: *Waters-Pierce Oil Company* v. *Van Elderen et al.*, 137 Fed. 557.

The Evidence Upon Which the Directed Verdict Was Given.

Undisputed Facts.

Guy Stringfellow, husband of plaintiff, and plaintiff's two children, Hazel Stringfellow, seven years of age, and Jack

Stringfellow, nine years of age, met their death on March 9th, 1931, in a grade crossing accident in the incorporated town of Dunedin, Florida, the accident happening about 6:00 in the afternoon (R., p. 54-55).

The defendant's tracks ran north and south at this point and Scotland Street, upon which the accident happened, runs east and west (R., p. 56). The Dunedin railroad station, one block north of the scene of the accident, was a flag stop for this particular train, but which on occasions when not flagged slowed up for the purpose of taking on mail (R., p. 85).

Guy Stringfellow, the driver of the automobile in which his two children were riding, lived in the town of Dunedin, was familiar with the crossing and had crossed it frequently (R., pp. 74-75).

The automobile was traveling eastwardly upon Scotland Street and the train northwardly upon its right-of-way, crossing Scotland Street (R., p. 65).

After the collision with the vehicle, the train ran approximately 325 feet (R., p. 80).

There are cross-arms on Scotland Street approaching the crossing from either direction, marked "Railroad Crossing" (R., photograph, p. 92-131-A). There are three tracks at the intersection of this railroad and Scotland Street, the middle track being the main track upon which the accident happened, the gauge being four feet, four inches (4′, 4″), and the distance from the west line of the main track to the west line of the house track is fifteen feet, eight inches (15′, 8″). A stop sign protruding upward into the street a few inches was to the right of the middle of Scotland Street, going east, approximately twenty feet (20′) from the west rail of the house of west track (R., p. 64).

Guy Stringfellow was driving his car eastwardly upon Scotland Street, approaching the railroad crossing at a rate of speed of between ten or fifteen miles per hour (R., p. 68). He did not stop his automobile before entering the track (R., pp. 68-77-78-79-80).

He slowed up his automobile slightly, looked in the direction from which the train was coming and speeded up to cross the tracks, and was hit (R., p. 72).

At the time Mr. Stringfellow looked in the direction from which the train was coming, he had just passed the witness, Mrs. Seely, who at that time was on the north side of Scotland Street, walking eastwardly, toward the crossing (R., pp. 70-71).

At the time Mr. Stringfellow looked in the direction from which the train was approaching and then speeded up, Mrs. Seely was approximately ninety feet (90') from the crossing on the north side of Scotland Street, and looked and saw the train approaching (T., p. 72).

The best distance that a train of this character, traveling over this crossing, going at the rate of twelve or fifteen miles an hour, could be stopped, in the opinion of an expert, is 250 to 350 feet; going at a rate of speed of 35 miles an hour, could be stopped from 450 to 500 feet (R., p. 83).

The engineer, being on the right-hand side of the train, proceeding north, did not see the automobile until the happening of the accident (R., p. 65). The fireman, on the left-hand side of the engine, proceeding north, when within 30 to 40 feet of the crossing, saw the car approaching the crossing 30 or 40 feet therefrom, and called a warning to the engineer, who immediately applied the emergency brakes (R., pp. 67-68). From a point fifteen feet, eight inches of the west rail of the main line the view south is absolutely unobstructed (R., p. 61).

While there were some trees and shrubbery in the lot adjoining the right-of-way, the obstruction was not a great deal and was not very thick (R., p. 66).

See also photographs opposite page 92 of the record, to-wit:

131-A, 131-E, 131-F, 131-G, 131-L, 131-M.

Disputed Facts.

Speed:

As to the speed of the train, plaintiff's witnesses testified at a rate of speed of from 35 to 40 miles an hour (R., p. 57), while the defendant's witnesses testified at a rate of speed of from 10 to 15 miles an hour (R., p. 68).

Warning Signals:

There is an apparent conflict as to warning signals given by the respondent, but when we measure the testimony of the plaintiff's witnesses, who testified that they heard no signals, by the rule of law laid down by this Court in the case of *Northern Pacific Railroad* v. *Freeman,* 174 U. S. 379, 43 Law Ed. 1014, and as fully explained by the Circuit Court of Appeals of the Eighth Circuit, the apparent conflict disappears.

> "But where the attention of those testifying to a negative was not attracted to the occurrence which they say they did not see or hear, and where their situation was not such that they probably would have observed it, their testimony is not inconsistent with that of credible witnesses who were in a situation favorable for observation, and who testify affirmatively and positively to the occurrence. There is then no conflict."
>
> *Chicago & North Western Ry. Co.* v. *Andrews,* 130 Fed. 65, 70.

Two of the witnesses who testify as to hearing no bell or whistle testified that they heard the noise of the train com-

ing, to wit: George Smart (R., p. 61) and C. W. Cleary (R., p. 63).

Harry Lishness testified that he heard both the big whistle and the smaller whistle (R., p. 59).

Mary Mildred Smith, who was only one short block away from the scene of the accident and was in a position to hear and had occasion to hear, testified that she heard neither whistle nor bell and that the train was making no noise, yet she stopped to allow the train to pass (R., p. 58).

Mrs. Crystal V. Towne, who was about 150 feet from the crossing, and remained there several minutes before the happening of the accident, heard nothing, did not even see Mr. Stringfellow pass, but claims to have seen the actual collision at the instant thereof.

On the contrary, all of the employees of the defendant testified as to warning signals being given (R., pp. 64-85).

Likewise, Mrs. Mabel L. Seeley (R., p. 69), O. C. Howell (R., p. 75), E. H. Baldwin (R., p. 78), and Roy Outing (R., p. 79), all disinterested witnesses, and in a posititon to see and hear, testified to the affirmative fact as to the warning signals.

Vision:

One of plaintiff's witnesses testified that you could only see southwardly on Scotland Street when you reached a point on the side track which is shown to be fifteen feet, eight inches from the main track (R., p. 61).

Another of plaintiff's witnesses testified that while standing at the stop signal on the west side of the track, before the bushes were cut, he could see down the railroad track sixty-five feet (R., p. 86).

A defendant's witness testified that at the stop signal, which is shown to be a distance of 35 feet from the main track, you could see down the track 250 feet (R., p. 64).

Another witness testified that she was half way between the Smart home and the crossing, on the north side of the street, which is testified to as being 180 feet from the crossing, therefore making her 90 feet from the crossing—and she saw the approaching train at the time Mr. Stringfellow looked in the same direction and then speeded up (R., p. 72).

Conclusion.

We respectfully submit upon these facts that the conclusion is inevitable that the driver of this automobile, the plaintiff's husband, being familiar with the crossing, did not stop but looked and saw the train coming and undertook to cross instead of waiting for the train to pass. If this is true, the consequences of his mistake and temerity cannot be cast upon the Railroad Company.

Chicago, Rock Island & Pacific R. R. Co. v. *Houston*, 95 U. S. 697; 24 Law Ed. 542.

If it should be argued that he did not see the train, we call the Court's attention to the undisputed evidence that he looked toward the train from a position no more favorable for observation than Mrs. Seely, who looked and saw the train approaching (R., p. 72), and therefore the natural presumption is that he saw what Mrs. Seely saw.

Again, the fireman testified that when he was from 30 to 60 feet from the crossing, he looked and saw Mr. Stringfellow; therefore, Mr. Stringfellow could have seen him.

As said in an old opinion by the Supreme Court of New Jersey, in speaking of persons approaching the track:

> "and if they were, as the testimony shows, seen by those upon the train, they must have seen it, and should have waited until it passed."
>
> *Telfer* v. *Northern Railroad Co.*, 30 New Jersey Law Reports, page 188; see page 196.
>
> *Moore on Facts*, Vol. 1, page 296, Par. 281, wherein it is said:

> "Presumption that a Person could see what Others saw.—There is a natural presumption that a person with good eyesight saw or could have seen what others saw in no more favorable position for observation unquestionably saw."

If it be suggested that while testimony is undisputed that he looked, there is no testimony that he saw, we invoke the application of the presumption above stated, and also the rule of law that:

> "Where the proven facts give equal support to each of two inconsistent inferences, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recovery."
>
> *Pennsylvania R. R. Co.* v. *Margaret V. Chamberlain,* decided by this Court February 13, 1933; 77 Law Ed., page 503; see pages 506-507.

The burden of proof was on the plaintiff to show not only negligence on the part of the defendant, but that it was the proximate cause.

> *New York Central R. R. Co. v. Antonia Ambrose, as Admx., etc.,* 280 U. S. 486; 74 Law Ed. 562.

If it be suggested that he did not hear the warning signals, we invoke the presumption that:

> "Where a sound is heard by one person, the inference would be that all other persons of good hearing and having equal opportunity to hear, heard the sound also."
>
> *Moore on Facts,* Vol. 1, Par. 192.

We respectfully submit that while this Court, with its great burden of grave legal questions involving the Nation, should not be required to minutely examine and analyze a record involving matters of this kind, yet a close analysis

thereof discloses that the district court was correct in directing a verdict herein and that there is no error in the affirmance thereof by the circuit court of appeals, and that this Court will either dismiss the petition of certiorari heretofore granted herein or affirm the action of the circuit court of appeals in accordance with its opinion.

JAMES R. BUSSEY,
SAM H. MANN, JR.,
McKINNEY BARTON,
Attorneys for Respondent,
St. Petersburg, Florida.

F. BARRON GRIER,
Greenwood, S. C.
W. E. KAY,
Jacksonville, Florida.
Of Counsel.